Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

IN RE: ONTOS, INC.
Debtor

T. MARK MORLEY and THOMAS J. MCCOY
Petitioners

v.

ONTOS, INC.; JOSEPH G. BUTLER, as Chapter 7 trustee of the estate of Ontos, Inc.; FIRESTAR SOFTWARE, INC.; KENNETHLORD; AMPHION VENTURES; ROBERT J. BERTOLDI;RICHARD C.E. MORGAN; VENNWORKS, LLC,
JOHN FITZGERALD, Trustee.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the First Circuit

APPENDIX

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Bankruptcy Court Transcript

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS – BOSTON

IN THE MATTER OF:	.	
	.	Case #04-10157
ONTOS, INC.	.	Boston, Massachusetts
	.	**June 29, 2005**
Debtor .	.	10:05:50 a.m. O'clock

TRANSCRIPT OF HEARING ON:
(#29) STIPULATION BY TRUSTEE, JOSEPH C. BUTLER;
(#30) MOTION TO APPROVE STIPULATION;
(#53) OBJECTION BY CREDITORS THOMAS McCOY AND T. MARK MORLEY;
(#54) AFFIDAVIT OF KEVIN O'CONNOR, ESQ.; (#64) RESPONSE;
(#57) MOTION BY CREDITORS McCOY AND MORLEY FOR ORDER AUTHORIZING THEM TO PROCEED AGAINST DEBTOR'S SOLVENT CO–DEFENDANTS; (#64) OBJECTION BY TRUSTEE, JOSEPH C. BUTLER;
(#66) RESPONSE BY FIRESTAR SOFTWARE AND KENNETH LORD
BEFORE THE HONORABLE WILLIAM C. HILLMAN, J.U.S.B.C.

APPEARANCES:

Trustee/For the Trustee: JOSEPH G. BUTLER, ESQ.
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----------continued---------->

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APPEARANCES - -Continued

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(At 10:05:50 a.m.)
THE COURT: Ontos, Inc.
MR. BUTLER: Good morning, Your Honor.
THE COURT: Good morning. Good morning. Okay.
Mr. Butler, I think you're up first.
MR. BUTLER: Good morning, Your Honor. We have my motion for approval of the stipulation settling the estate's claims against the various parties and the objection by Misters Morley and McCoy, Mr. Morley and McCoy's motion to proceed against the -- basically those same defendants with the same claims. The gist of the issues here, it seems to me, is twofold, whether the estate controls all of those claims exclusively and whether the settlement's reasonable.
I suppose the first issue makes sense to address first. I think that the case law is fairly clear on the fraudulent transfer and successor liability claims that those are in fact assets of the estate, that once the petition is filed I guess the Trustee had the exclusive authority to pursue. The alter ego claim, piercing the corporate veil claim is slightly different because, granted, the law is less clear, at least in this jurisdiction, but I do believe that the majority of the case law would support the proposition that only I as the Trustee can pursue those claims.
Looking over the stuff again this morning, it seemed to me that oddly enough the footnote in the

memorandum, my memorandum, sir, obviously very similar to the -- the settling parties', dealing with what alter ego claims really are as sort of the -- the heart of that. Those, as I understand them, are not so much a cause of action as a remedy, and all of this kind of boils down to the fraudulent transfer claim because I've assumed throughout the negotiation discussions about this that all of the other things were true, that Mr. Bertoldi and Mister -- I'm terrible with names -- but Vennworks at Amphion -- and basically controlled the activities of -- of the debtor prior to the select fraudulent conveyance and things of those natures, which would support this alter ego theory. On the other hand you have to have some kind of wrongdoing, and the only wrongdoing that I understand has been alleged is this alleged fraudulent conveyance. That alleged fraudulent conveyance obviously going back to the fraudulent conveyance theory could be pursued by me on behalf of all of the creditors, not just Mr. Morley and McCoy, and the alter ego theory that comes back into it as the remedy. The problem with all of that and what I just boiled down to for the last year that we've been discussing it is whether the alleged fraudulent conveyance is in fact fraudulent, and that boils down, to me, to a single issue; what was the software worth at the time it was conveyed. The consideration, in my mind, anyway, is the $590,000, the 490

in cash plus the $100,000 note that was paid. The assumption of the 13 million dollars in debt owed to Vennworks and Amphion, to me, you know, if things had worked out differently, we'd be arguing about whether that was really debt or equity and whether it should be subordinated or not subordinated. So I don't consider that to be really true consideration for that transfer.

Beyond all that, though, I don't know what the software was worth. I do know several things. I know that the -- what the market was like in 2000-2001 when all this was going down. I do know that venture capital money had essentially dried up and specifically was drying up in this case because, from the facts alleged in the state complaint, it was clear that they were having trouble making payroll from week to week, and it -- and as I understand the facts, you know, they'd have to call up on every Thursday or every other Thursday, whenever the payroll was due when Amphion or Vennworks would have to put more money in, and that apparently it had been made clear that the money's drying up.

If this transaction had not taken place, I wonder sometimes what would have happened, and I suspect that there would have been a bankruptcy well prior to the date that there was one, we would had a company that had software that there was no market for, which is why I think that the $590 000 consideration probably was adequate consideration

for this software, and although no one could know it at the time in September of 2001 when the software was transferred, it's my understanding that Firestar has never really made a profit with it in the almost four years since. Beyond all of that, Your Honor, the estate has basically no other assets. It has no cash. I think that the litigation, if I were to pursue it, would be expensive and lengthy, and I don't know that I could ever prove that the software was worth more than $590,000, and that is really the gist of my argument.

THE COURT: Thank you. Trustees move to approve a stipulation and asks, of course, that I deny the motion to proceed against the other defendants. Let's hear the other side if anyone wishes to speak. Yes, ma'am.

MS. GAMETCHU: Thank you, Your Honor. Mayeti Gametchu. I represent the creditors, Tom McCoy and Mark Morley. Your Honor, just -- just to put this in context, the burden is on the Trustee, of course, to show Your Honor that the proposal is fair and equitable to the creditors, and that's of paramount importance.

The -- the state court action that my clients initiated asserted various claims arising out of their employment with the debtor. In that -- in that litigation discovery had proceeded before the -- before the bankruptcy. Ontos essentially ceased operating as a company in January of

'02 but did not declare bankruptcy. My clients sued, and discovery commenced. We then brought a motion to compel the production of documents, and -- and the Court appointed a Discovery Master to adjudicate that motion, and the Discovery Master ordered documents to be produced within ten days and essentially granted most of our requests for production. The very next day, Your Honor, the solvent co-defendants of the debtor and the debtor went into court, and the debtor filed its -- its petition for bankruptcy and effectively stayed the state court litigation two years after this company ceased operating; and we submit to Your Honor that that -- that was strategic insolvency. It was designed to delay the state court action, and it's an independent grounds for Your Honor to dismiss the bankruptcy outright, and it's against that backdrop, Your Honor, that we're before you.

The proposal before Your Honor is -- is to release the debtor's solvent co-defendants from a variety of claims, including the ones asserted by my clients in state court for $50,000. The Trustee has admitted to -- to my partner, Kevin O'Connor, that he never countered that $50,000 offer, so he never went back to the solvent co-defendants and said, you know, 60,000. There -- there was absolutely no negotiation whatsoever with respect to that amount.

In addition, Your Honor, in the -- in the past year

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since Ontos has been in bankruptcy we have repeatedly requested the Trustee take discovery, which is -- which he obviously has the power to do. We've even drafted proposed discovery requests and provided them to him. He's refused to do that. Instead, he comes before Your Honor, and he opines as to the validity of our case without ever having taken any discovery. Now we -- we've had the benefit of limited discovery, of course, because the case has been in state; but even with the limited discovery that we've had the benefit of in state court, we have available facts to us to show Your Honor that our -- that our claims are viable.

So against -- against that backdrop, Your Honor, we first ask that we be permitted to proceed in state court on our claims, on our alter ego claim and on our fraudulent conveyance claim. The Trustee's crack that Massachusetts has not settled the issue of whether or not an alter ego claim is property of the estate or --

THE COURT: But it *is* settled as the fraudulent transfer. That's *his*, not yours.

MS. GAMETCHU: Okay. Even putting that aside, Your Honor, with respect to alter ego we would request that the Court allow us to proceed, and in -- and it's -- it's both because we think we're permitted to under the law, but also as an equitable matter, Your Honor. We're -- we're the creditors. We're here. We believe in our claims, and I

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think we've put forth enough evidence to show that they're viable, and we request that we be permitted to proceed. If -- if Your Honor concludes that the alter ego claim is the property of the estate, we would -- we would ask Your Honor to -- to rule that this proposal is not fair or equitable. Again, the Trustee's opinion as to the likelihood of success of our case comes literally without a shred of discovery in this case, and -- and if we look at his papers, he references the -- the co-defendants' denial of fraud as support for his opinion that this case isn't viable, and those are obviously self-serving statements, Your Honor; and even with respect to the reply to our -- our opposition to the settlement proposal, there are a number of facts that talk about Firestar has never been profitable, and, therefore, there's no reason Ontos would have been profitable, Your Honor. They have -- they literally have not cited to an affidavit or an e-mail or a document to support that, and we put before Your Honor plenty of similar support. And I'd like to now talk about why -- why we believe our fraudulent conveyance claims and our alter ego claims are valid.

THE COURT: Not the fraudulent conveyance claim.

MS. GAMETCHU: Excuse me, Your Honor?

THE COURT: The fraudulent conveyance claim is not yours.

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MS. GAMETCHU: Well, Your Honor, I'm now -- I'm now talking about in the event that Your Honor does conclude that, that you would -- that you would deny the proposed settlement for $50,000 to release them from liability arising out of that claim.

THE COURT: Okay.

MS. GAMETCHU: And as -- as a basis for that denial, Your Honor, it's -- it's our submission that --

THE COURT: All right. You go ahead.

MS. GAMETCHU: -- it's a viable claim.

THE COURT: Go ahead.

MS. GAMETCHU: Your Honor, Ontos was a software company that had essentially two products and two divisions along those products. One product was called ObjectSpark, and one product was called BrightRoad. Everybody agrees that BrightRoad was worthless, was not sold at any point. The company received no -- derived no revenues from it, either through the sale of its software services or through any sort of asset sale. So the only asset of -- of value was ObjectSpark.

In September of 2001 the -- the defendants in the state court case, and those -- those people are the -- the principals of the venture capital firms, the venture capital firms themselves, and -- and the then CEO of Ontos. They basically created Firestar, same owners. Both the VCs

controlled the board of Ontos, the VCs controlled the board of Firestar. The CEO of Ontos at the time, Kenneth Lord, voted in favor of transferring ObjectSpark to Firestar on behalf of Ontos, and the VCs of the Firestar board also voted on that transaction. The -- the -- the asset was then transferred to Firestar for roughly $500,000. Within a month of that transaction, Your Honor, these defendants now operating under Firestar -- and I would also add, Your Honor, that -- that the defendants have admitted in depositions that, one, the -- the principal of the VC has admitted that the Firestar assumed substantially all of Ontos's liabilities, and the -- the CEO, Ken Lord, who then became CEO of Firestar, has admitted in his deposition that -- that Firestar was essentially nothing more than a continuation of Ontos. Those were not his words, but he has admitted that Firestar was comprised solely of Ontos's former employees, Ontos's intellectual property. They used their computers. Ken Lord worked out of his same office and used his same computer. It's the same company, Your Honor. The -- within a month after this transaction when this -- when this software was transferred for roughly $500,000, the VCs and the -- the solvent co-defendants of Ontos went out, and they represented to their investors and their potential investors when they were trying to raise money that it was worth 11 million dollars, and, Your Honor,

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now they come to you and say, "Well, that was book value, and
that doesn't really tell you what market -- what -- what --
what fair value or market value is," and I just submit to
Your Honor that we've got two different versions here. When
they're in court trying to defend this transfer as non-
fraudulent, they're telling you it worth nothing more than
$500,000. When they're a month later trying to raise money
for that same product and the same company, they're
telling -- they're telling the world that it's 11 million
dollars, and we obviously -- we don't have to prove our case
right now, but I think there's enough there, Your Honor, to
show that these claims are viable.
In addition, with respect to alter ego, the --
the -- these -- these venture capitalists absolutely
controlled this company. They didn't just fund it, Your
Honor. They control the board. They essentially managed it.
Our -- my clients were senior executives of this company.
They were stripped of their ability to decide what vendors to
pay and what vendors not to pay. They had to get approval on
expenditures for items as small as $300. They were
capitalized on a -- on a month-by-month and at times week by
week basis. They had to submit requests that the company
was -- was in financial despair, admittedly, so they would
have to submit requests and say, "We only have X amount of

25 money, who do we pay first?" and the VCs would tell them who

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1 to pay.
2 The VCs hired and fired -- absolutely controlled
3 this company, and in fact, Your Honor, at the creditors'
4 meeting the principal of the VCs, Mr. Bertoldi, admitted,
5 when asked by my partner, Mr. O'Connor, who's representing my
6 clients at the creditors' meeting, he admitted in sworn --
7 sworn testimony that he was, quote, "in constant
8 communication with -- with Mr. Morley," my client, "about
9 every aspect of all parts of the business." He said it
10 emphatically, and, Your Honor, the -- we have hundreds and
11 hundreds of e-mail communications that support this, many of
12 which we've put before Your Honor.
13 So I would -- I would -- I would request that if --
14 if -- if Your Honor does not permit us to proceed in state
15 court, that -- that Your Honor rejects the proposal for
16 $50,000 to release these claims. They're worth in excess of
17 a million dollars, and -- and I would also ask that Your
18 Honor consider the abuse of the Bankruptcy Code that's taken
19 place and the fact that this company waited two years until
20 the day after it was ordered to produce documents in the
21 state court action that we haven't gotten, obviously, because
22 it was stayed, to file in bankruptcy and thwart our state
23 court action. Thank you, Your Honor.
24 THE COURT: Thank you very much.
25 MR. BUTLER: Briefly, Your Honor?

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THE COURT: Certainly.
MR. BUTLER: On the -- the timing of the filing of the bankruptcy, I had nothing to do with it, obviously. There is no motion before Your Honor to dismiss the case. It seems to me that -- and timing becomes an issue, but if -- if one were to be brought, it would have been appropriate to do that at the commencement of the bankruptcy.
On the negotiations, I don't feel that it's appropriate for me to get into who said what to who and when, but the fact that I didn't counter doesn't mean there were no negotiations. There were negotiations. In fact, the offer that I received to settle this was outstanding for a very long time while I talked to Mr. Morley and Mr. McCoy's counsel about whether there was some better offer that they might make to me, and I didn't get one.
On the issue of whether BrightRoad, the other software, was worthless, I think we can all agree that today it's worthless. In September of 2001 whether people felt that way is another issue, and whether it in fact was worthless then I don't know. I understand that in fact after this alleged fraudulent conveyance of ObjectSpark there was some discussion between the settling parties and Mr. Morley and Mr. McCoy about Mr. Morley and McCoy acquiring

24 BrightRoad, and it didn't come to fruition, but there was at
25 least some indication that it had some value at the time.

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1 As I said earlier, with respect to the venture
2 capital people and Mr. Lord voting to do all of this and the
3 venture capital people, you know, controlling the
4 expenditures for some period of time, I assume from the
5 beginning that all of that is true, and -- and -- which gets
6 into the whole issue of discovery.
7 The only indication that I've heard from Mr. Morley
8 or McCoy or seen in the complaint or seen in an of the
9 documents that this software was in fact worth more than the
10 $590,000 that I considered would have been paid for it is
11 that -- that thing about the 11 million dollar valuation of
12 Firestar a month later. My understanding of that is, as Ms.
13 Gametchu put it, that it was book value, and it was based on
14 the amount that had been invested in previously, really
15 Ontos, but ultimately in Firestar because the 13 million
16 dollars got -- got transferred over when it assumed that
17 debt.
18 I have seen many cases, and I assume Your Honor's
19 seen more where ten million dollars was invested in
20 developing software. That doesn't make the software worth
21 the ten million dollars, and that's sort of my bottom line on
22 this.
23 Could I do discovery? Yes, I could do discovery.
24 I could probably do $100,000 worth of discovery, but if I did

25 $100,000 worth of discovery and came to the same point that I

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1 started at, that I couldn't prove that the software's worth
2 more than $590,000, then, you know, this -- then that would
3 be a waste of my time and the estate's and creditors'.
4 THE COURT: Thank you. Anyone else wish to be
5 heard? Mr. Murphy.
6 MR. MURPHY: Just briefly, Your Honor. Harry
7 Murphy, on behalf of some of the seven defendants, and I'm
8 speaking for the proposed-seven defendants, so I speak also
9 for co-counsel this morning, Your Honor.
10 The most interesting legal issue perhaps raised by
11 some of these papers, Your Honor, is -- relates to the
12 Trustee's standing to settle the alter ego claims, I think,
13 the breach of fiduciary duty, fraudulent conveyance claims
14 is -- really can't be seriously disputed, Your Honor, as your
15 Court's already indicated.
16 This whole -- there is law going both ways, but I
17 think if Your Honor has it, and I have another copy for the
18 Court if you would like, that to look at the complaint that
19 was actually filed by the plaintiffs in state court, if I
20 may, and if I may, point to Paragraph -- Count 6, which is
21 really the so-called may raise a dispute, a legal issue in
22 the -- in the Courts' minds, and that's on Page 12, Your
23 Honor.
24 Do you have one, Counsel?
25 And in my mind this is clearly a claim that the

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Trustee can settle because you can say there's an allegation not that Newco, the acquired -- the new company, Firestar, but is the venture capital people in its offices of -- in the debtor's offices "used the corporate firm of Ontos for fraudulent purpose and intermingled and such that there's no legal distinction."
That's an allegation in Paragraph 73 that these folks visited harm upon the corporation. That harm was the transaction in question, and I -- you may get esoteric on successful liability and the cases go all the way, but this is not some manifestation to -- of confusing or intermingling. This is a claim that these folks damaged the corporation, and I think, as with a fiduciary duty claim, as with the fraudulent conveyance claim, if the Trustee's ever going to be able to realize monies for creditors under these cases, he has the ability to prosecute these types of claims and necessarily needs the ability to settle them.
I won't speak to the -- to the valuation of claims. Obviously, we don't think much of the claims, but I can tell you we went back and forth with Mr. Butler at some length about the validity of the claims. We provided him extensive documentations as to what our company did, the acquiring company has done. It hasn't made any money for the last four years. Mr. Butler admitted to me it's -- although hindsight's 20/20, if we were making 100 million dollars a

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1 year, he would be asked for more, but we produced tax
2 returns, we produced other documents to Mr. Butler, and he's
3 looked at us and (unclear) thing hasn't made any anything.
4 This is not the first software company that either
5 one of us has been involved with. If his point was well
6 taken that in the absence of the transaction going down for
7 $600,000 in ultimate cash, this would have been a Chapter 7
8 back then, and no one would have gotten anything. So I
9 suggest that under the circumstances the settlement should be
10 approved. Thank you.
11 THE COURT: Thank you. Anyone else wish to be
12 heard? Would you like the last word?
13 MS. GAMETCHU: Your Honor, just response to the
14 last comments. With all -- with all due respect, Your Honor,
15 we -- everything that was just said to you in this -- in this
16 last piece, Your Honor doesn't have an affidavit or a
17 document before you that -- that supports it. So it's -- I
18 would just point out that we -- we certainly haven't seen
19 these tax returns or these documents that -- that are being
20 referred to here today, and -- and neither has the Court.
21 Thank you.
22 THE COURT: Thank you, Ms. Gametchu. Well, I've
23 got two things to deal with. As to the motion to allow
24 Morley and McCoy to proceed against the solvent co-
25 defendants, that depends on what I consider to be the nature

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of their claims, the alter ego claims and the other claims. I'm not sure that I agree 100 per cent with Mr. Butler that these alter ego claims are merely a remedy, but I do believe that alter ego and related claims are certainly derivative from any liability that is owed to the debtor here; and being derivative, I believe that they are the Trustee's property and not that of individual defendants -- individual plaintiffs against those other people.

Indeed, that's consistent with the whole bankruptcy concept, which is to take all of the goodies and divide them equitably between everybody, and nobody gets an individual piece of the action, and so I'm going to deny the motion to allow Morley and McCoy to continue with their state court action against the other defendants.

As to the approval of the stipulation, this has got to be the most amorphous thing on earth. I don't know if any of the counsel that are present here today were here on another case I had a couple of years ago, and the question was the value of the intellectual property, and we had two experts in. They were experts, and one said the software was worth 200 million dollars, and the other experts -- I see smiles, they must have been here -- and the other expert said it was worth zero; and they were both right, assuming the assumption on which they based their opinions: Is it today's software or yesterday's software?

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Well, I can't make that call. I'm not sure anybody can make that call. We've got a highly experienced Trustee who has done such due diligence as is reasonable under the circumstances. It's not as if the software was given away. There was money for it. I can't say that the Trustee is wrong in wanting to settle the claims for the amount of money he's been offered, and the usual rule is that absent anything that raises my eyebrows, my hackles, or disturbs my stomach, I will go with the Trustee's business judgment, and none of those negative factors are present here.

The motion to approve the stipulation is granted.

Thank you all very much.

MR. MURPHY: Thank you, Your Honor.

MR. BUTLER: Your Honor, I -- I can share it with counsel. I have a short proposed order.

THE COURT: Well, has everybody seen it?

MS. GAMETCHU: No, Your Honor.

MR. BUTLER: No. Sorry, Your Honor.

THE COURT: If you need one, I was just going to do a proceeding memo and say the motion's granted. Won't that hold you?

MR. MURPHY: Your Honor, the draft order doesn't say much more than that.

THE COURT: Then forget about the draft order. I'll just enter my proceeding order.

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MR. BUTLER: Thank you, Your Honor.

THE COURT: Thank you all.

MR. MURPHY: Thank you, Your Honor.

(End at 10:30:31 a.m.)

* * * * * * * * * * * * *

I certify that the foregoing is a true and accurate transcript from the electronically sound recorded record of the proceedings.

TARA MARTIN, for Date
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Bankruptcy Order -Grant

UNITED STATES BANKRUPTCY COURT, DISTRICT OF MASSUCHUSETTS
Proceeding Memorandum/Order of Court

In re: Ontos, Inc. **Case #:** 04-10157 Ch: 7

MOVANT/ APPLICANT/ PARTIES :

#30 Motion to Approve Stipulation
#29 Stipulation by Trustee J. Butler
#53 Objection by Creditor Thomas McCoy and T. Mark Morley #54 Affidavit of M. Morley
#55 Declaration of K. O'Connor
#64 Response
J. Butler, M. Gametchu

OUTCOME:

_____-By Agreement of the Parties
30 Granted_____Approved____Sustained
_____Denied_____Denied without prejudice
_____Withdrawn in open court____Overruled
_____OSC enforced/ released

_____Continued to: _____for: _____

_____Formal order/stipulation to be submitted by: _____
Date due: _____
_____Findings and conclusions dictated at close of hearing incorporated by reference.

_____Taken under advisement:

Brief(s) due_____From_____
Response(s) due_____From_____
_____Fees allowed in the amount of: _$_____
Expenses of: _$_____

_____No appearance/response by:

_____DECISION SET OUT MORE FULLY BY COURT AS FOLLOWS:

_____
_____
_____
_____

IT IS SO NOTED:

_____
Courtroom Deputy

IT IS SO ORDERED:

s/William C. Hillman
U.S. Bankruptcy Judge
Dated: 06/29/2005

Bankruptcy Order -Denial

UNITED STATES BANKRUPTCY COURT, DISTRICT OF MASSUCHUSETTS
Proceeding Memorandum/Order of Court

In re: Ontos, Inc. **Case #:** 04-10157 Ch: 7

MOVANT/ APPLICANT/ PARTIES :

#57 Creditors T. Mark Morley and Thomas J. McCoy's Motion for an Order Authorizing Them to Proceed Against Debtor's Solvent Co-Defendants
#64 Objection by Trustee, Joseph Butler
#66 Response by Interested Parties Firestar Software, Kenneth Lord
K. O'Connor, H. Murphy, J. Butler

OUTCOME:

_____-By Agreement of the Parties

_____Granted_____Approved____Sustained
57____Denied_____Denied without prejudice
_____Withdrawn in open court____Overruled
_____OSC enforced/ released

_____Continued to: _____for: _____

_____Formal order/stipulation to be submitted by: _____
Date due: _____
_____Findings and conclusions dictated at close of hearing incorporated by reference.

_____Taken under advisement:
Brief(s) due_____From_____
Response(s) due_____From_____
_____Fees allowed in the amount of: _$_____
Expenses of: _$_____

_____No appearance/response by:

_____DECISION SET OUT MORE FULLY BY COURT AS FOLLOWS:

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IT IS SO NOTED:

_____
Courtroom Deputy

IT IS SO ORDERED:

s/William C. Hillman
U.S. Bankruptcy Judge
Dated: 06/29/2005

Massachusetts Federal District Court Memorandum and Order

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Appeal Nos. 05-11708-RGS and 05-11710-RGS

IN RE ONTOS, INC.

Bankruptcy No. 04-10157

Chapter 7

On Appeal from Orders of the United States Bankruptcy Court for the District of Massachusetts (Eastern Division) (Hon. William C. Hillman, United States Bankruptcy Judge)

February 3, 2006

STEARNS, D.J.

This is an appeal of two orders entered by the Bankruptcy Court (Hillman, J.) on June 29, 2005. Appellants Mark Morley and Thomas McCoy appeal the allowance of a motion approving a stipulation of settlement and release entered with the defendant-appellees by the Bankruptcy Trustee for the estate of Ontos, Inc.[1] The release extinguishes certain state law claims asserted by appellants in a suit brought in Essex Superior Court. Appellants also appeal the denial of their cross-motion for permission to

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[1] The defendant-appellees are Vennworks, LLC, Amphion Ventures, Firestar Software, Inc., Robert Bertoldi, Richard Morgan, and Kenneth Lord.

prosecute the released claims in the state court action. Appellants complain that Judge Hillman exceeded his jurisdictional authority and abused his discretion in approving the settlement. Appellants filed a timely notice of appeal.

ISSUES ON APPEAL

Appellants' brief does not state the matters appealed with any precision. The statement of issues is adapted from the brief of the Trustee and the arguments made at the hearing before Judge Hillman.[2] The court identifies the following as the issues to be decided on appeal.

> (1) Did the Bankruptcy Court have jurisdiction to hear and determine the Trustee's motion to approve the stipulation of settlement and release? (2) Is the fraudulent transfer claim brought by appellants in the state court property of the estate within the meaning of 11 U.S.C. § 541? (3) Did the Bankruptcy Court abuse its discretion in approving the stipulation of settlement and release?

BACKGROUND

Ontos was incorporated in Delaware in 1987. Ontos developed internet software and provided technology consulting services. In the mid-1990s, Ontos invented an Internet-related technology to support object-oriented data management. The associated software was named "ObjectSpark." Ontos was not profitable and depended on bridge loans from its majority shareholders, Vennworks and Amphion, to pay operating expenses. In 2000, the Ontos Board of Directors considered selling ObjectSpark as a means of raising capital.

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[2] When asked to frame the issue at the hearing before this court, appellant Morley (a member of the bar appearing pro se to argue the appeal) responded that the Trustee had "no legal authority to settle [appellants'] claims."

Kenneth Lord became the Chief Executive Officer (CEO) of Ontos in the late spring of 2001. His principal task as CEO was to find a purchaser for ObjectSpark. When by September of 2001, no buyer had materialized, Lord caused a company he had formed, Firestar Software, Inc., to submit an offer. Ontos and Firestar were represented by separate counsel in the ensuing negotiations. An agreement to sell ObjectSpark to Firestar was eventually approved by the Ontos' Board by a 3-0 vote. Morley and McCoy, who were officers of Ontos and members of the Board, were present at the discussion but abstained on the vote. Firestar gave Ontos $490,000 in cash and a promissory note for an additional $100,000 (which was ultimately paid in full). Firestar also assumed approximately $13 million of Ontos' debt (most of which consisted of the loans from Vennworks and Amphion). Ontos used the proceeds of the sale to pay employee salaries (including those of the appellants) and debts owed to trade creditors.

On January 8, 2002, McCoy and Morley were terminated by Ontos. On June 18, 2002, they jointly brought a lawsuit in Essex Superior Court against Ontos and the defendant-appellees seeking payment of lost wages and severance benefits. In separate counts, the Complaint alleged breach of contract, breach of the covenant of good faith and fair dealing, violation of the Massachusetts Wage Act, fraud and deceit, fraudulent transfer, breach of fiduciary duty, and alter ego liability. With respect to the latter three claims, which are at the heart of the present appeal, McCoy and Morley allege that the appellees stripped Ontos of its most valuable asset (ObjectSpark) by selling it at less than fair market value and then using the proceeds "as they saw fit." According to appellants, Firestar was simply a "continuation" or alter ego of Ontos with Lord serving as its CEO, and its

staff composed entirely of former Ontos employees using Ontos' equipment to exploit Ontos' intellectual property.[3]

After eighteen months of litigation in the state court, on January 8, 2004, Ontos filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Joseph Butler was appointed by the Bankruptcy Court as the Trustee. On April 2, 2004, McCoy and Morley filed proofs of claim together with copies of their state court Complaint. Appellants consider themselves to be general creditors of Ontos because of the lost wages and employment benefits. On May 12, 2004, McCoy and Morley sought approval from the Bankruptcy Court to proceed in state court against the appellees on the Wage Act and fraud and deceit claims. The Bankruptcy Court gave its permission on June 8, 2004.

On March 11, 2005, the Trustee filed the motion to approve the stipulation of settlement and release. Over appellants' objection, the Bankruptcy Court on June 29, 2005, allowed the Trustee's motion. Paragraph 3 of the stipulation provides:

> [t]he Trustee, in consideration of, *inter alia*, (i) the $50,000.00 to be paid by [the Appellees], and [the Appellees'] waiver and/or release of any right to distribution from the Trustee or the estate on any claim which any of them may have against the Debtor or the chapter 7 estate, the Trustee, on his own behalf and on behalf of the Debtor and the Debtor's estate, waiver and/or releases any and all claims that the Debtor or the Debtor's estate may have against [the Appellees] arising out of or related to the conveyance by the Debtor of its ObjectSpark division to Firestar and any and all claims that the Debtor or the Debtor's estate may have against [the Appellees] used the

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[3] It should be noted that the litigation was instituted by McCoy and Morley not as a derivative action on behalf of Ontos but as an individual capacity suit seeking redress for personal wrongs.

> corporate form of Ontos for fraudulent purposes, intermingled Ontos' corporate activities and interests with their own person activities and interests such that there was no legal distinction between them, and that [the Appellees] are liable for the obligations of Ontos on any "alter ego," "piercing the corporate veil" or similar theory, including specifically, but not limited to, the claims set forth in Counts IV and VI of the complaint filed by Morley and McCoy which commenced the State Court Action.

In the argument before the Bankruptcy Court, the Trustee (supported by the appellees) argued that he had the exclusive right to compromise the fraudulent transfer and alter ego claims because they constitute property of the estate within the meaning of section 541(a) of the Bankruptcy Code or, alternatively, because they could have been asserted at his discretion for the benefit of Ontos' creditors pursuant to section 544.[4] McCoy and Morley for their part argued that the Trustee lacked standing under either provision of the Code. Alternatively, McCoy and Morley objected to the Trustee's agreement to give a release of claims that they value in excess of $1 million for a "mere" $50,000.

After hearing argument, the Bankruptcy Court ruled orally on both the Trustee's motion to approve the settlement and appellants' cross-motion for permission to proceed against appellees on the compromised claims in state court. Judge Hillman explained his rulings as follows.

> As to the motion to allow Morley and McCoy to proceed against the solvent co-defendants, that depends on what I consider to be the nature of their claims, the alter ego claims and the other claims. I'm

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[4] The Trustee did not purport to compromise the "personal" state law claims asserted by the appellants for violation of the Wage Act and fraud and deceit. These claims remain pending against the appellees in the Superior Court.

not sure that I agree 100 percent with Mr. Butler that these alter ego claims are merely a remedy, but I do believe that alter ego and related claims are certainly derivative from any liability that is owed to the debtor here; and being derivative, I believe that they are the Trustee's property and not that of the individual defendants – individual plaintiffs against those other people.

Indeed, that's consistent with the whole bankruptcy concept, which is to take all of the goodies and divide them equitably between everybody, and nobody gets an individual piece of the action, and so I'm going to deny the motion to allow Morley and McCoy to continue their state court action against the other defendants.

As to the approval of the stipulation, this has got to be the most amorphous thing on earth. I don't know if any of the counsel that are present here today were here on another case I had a couple of years ago, and the question was the value of the intellectual property, and we had two experts in. They were experts, and one said the software was worth 200 million dollars, . . .and the other expert said it was worth zero; and they were both right, assuming the assumption on which they based their opinions: Is it today's software or yesterday's software?

Well, I can't make that call. I'm not sure anybody can make that call. We've got a highly experienced Trustee who has done such due diligence as is reasonable under the circumstances. It's not as if the software was given away. There was money for it. I can't say that the Trustee is wrong in wanting to settle the claims for the amount of money he's been offered, and the usual rule is that absent anything that raises

> my eyebrows, my hackles, or disturbs my stomach, I will go with the Trustee's business judgement, and none of those negative factors are present here.
>
> The motion to approve the stipulation is granted.

June 29, 2005 Hearing Tr., at 17-19.

On July 11, 2005, appellants filed a notice of appeal and an election to have the appeal heard in the district court. They also sought a stay pending appeal. The Bankruptcy Court denied the stay request on August 11, 2005. After the appeal was fully briefed, the court on February 1, 2006, heard oral argument.

DISCUSSION

"The district courts of the United States shall have jurisdiction to hear appeals . . .from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under [28 U.S.C. § 157]." 28 U.S.C. § 158(a)(1). On an appeal to the district court, rulings of law by the Bankruptcy Court are reviewed *de novo*, while findings of fact are accepted unless clearly erroneous. Fed.R.Bankr.P. 8013. See Intrex, Inc. v. Commissioner, 321 F.3d 55, 58 (1st Cir. 2003); In re Healthco Int'l, Inc., 132 F.3d 104, 107 (1st Cir. 1997). Equitable orders of the Bankruptcy Court are reviewed for abuse of discretion. Grella v. Salem Five Cent Savings Bank, 42F.3d 26, 30 (1st Cir. 1994). It is the latter standard that governs here. If the Bankruptcy Court had jurisdiction to entertain the Trustee's motion to approve the stipulation of settlement and release, Judge Hillman's order granting the motion may be overturned on appeal only if this court finds that he abused his discretion in doing so. See In re Servisense.com, Inc., 382 F.3d 68, 71-72 (1st Cir. 2004).

Taking appellants' arguments in their logical order, there can be no question but that the Bankruptcy Court had jurisdiction to entertain the Trustee's motion. By the authority granted by 28 U.S.C. § 1334(e), "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, *and of property of the estate.*" [Emphasis added]. The property or "assets" of the bankruptcy estate include "all legal and equitable interests of the debtor in property . . . ." 11 U.S.C. § 541(a)(1). Section 157(b)(1) of Title 28 further provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments . . . ." Core proceedings within the meaning of 28 U.S.C. § 157(b)(2) are "matters concerning the administration of the estate," and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship . . . . " 28 U.S.C. § 157(b)(2)(A) and (O). Here, the Trustee's motion directly involved matters concerning the administration of the estate and the liquidation of assets and is therefore properly considered a core proceeding. The law is also clear that a fraudulent conveyance claim is property of the estate that with rare exception may only be prosecuted by the Trustee.[5] 11 U.S.C. § 541. See Nat'l Tax Credit Partners, L.P. v. Havlik, 20 F.3d 705, 708-709 (7th Cir. 1994) ("[T]he right to recoup a fraudulent transfer, which outside of bankruptcy may be invoked by a creditor, is property of the estate that only a trustee or debtor in possession may pursue once a bankruptcy is under way."); In re Pilavis, 233 B.R. at 3-4 (same). See also In re J.F.D. Enterprises, Inc., 223 B.R.

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[5] The limited circumstance in which general creditors have the right to assert fraudulent transfer claims arises when an estate representative or debtor-in-possession refuses unjustifiably to do so. See In re Pilavis, 233 B.R. 1, 3-4 (Bankr. D. Mass. 1999)

610, 621 (Bankr. D. Mass. 1998) (a cause of action seeking damages for harm to a corporation based on the prepetition conduct of its directors or managers becomes "property of the estate" upon the initiation of bankruptcy, and may be pursued only by a representative of the estate, whether the trustee or a debtor-in-possession); Feinman v. Lombardo, 214 B.R. 260, 265 (Bankr. D.Mass. 1997) (a bankruptcy trustee has exclusive standing to assert state law claims that could have been asserted by the debtor prior to the commencement of bankruptcy). As the Trustee stated at the hearing, it would be a strange and illogical interpretation of the law that recognized on the one hand the exclusive right of the Trustee to prosecute a fraudulent transfer claim, while on the other denying him the power to settle or compromise that very same claim. I agree.[6]

Appellants argue in the alternative that the Bankruptcy Court abused its discretion in approving a compromise "below the lowest point in the range of reasonableness." See Healthco Int'l, 136 F.3d at 51. "The approval of a compromise is within the sound discretion of the bankruptcy judge . . . and this court will not overturn a decision to approve a compromise absent a clear showing that the bankruptcy judge abused [his] discretion." Jeffrey v. Desmond, 70 F.3d 183, 185 (1st. Cir. 1995). Applying this standard "against the background understanding that'[c]ompromises are favored in bankruptcy,'" the First Circuit has articulated a four-part test to be applied by a bankruptcy judge in determining whether to approve a compromise of a debtor's claim.

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[6] Appellants' claims of successor and/or alter ego liability are derivative of the fraudulent transfer claim, and despite Judge Hillman's expressed hesitation on the subject, are more relevant to a theory of damages than they are to liability. It must also be stressed that the Trustee took care to exclude the appellants' personal state law claims from the stipulation of settlement and release.

> "(i) [T]he probability of success in the litigation being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and, (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise." The court's consideration of these factors should demonstrate whether the compromise is fair and equitable, and whether the claim the debtor is giving up is outweighed by the advantage to the debtor's estate.

In re Servisense.com, Inc., 382 F.3d at 72, quoting Jeffrey, 70 F.3d at 85. Judge Hillman's oral ruling makes clear that he understood and considered the relevant factors. As Judge Hillman observed, assigning value to intellectual property like internet software is more often art than science. This court is unable to say that Judge Hillman abused his discretion in accepting the judgment of the experienced Bankruptcy Trustee that $50,000 constituted fair consideration for the release.

ORDER

For the foregoing reasons, the Orders of the Bankruptcy Court are AFFIRMED.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE

First Circuit Court of Appeals Opinion and Order

In re: Ontos, Inc., No. 06-1512 (1st Cir. 3/1/2007) (1st Cir., 2007)

Page 1

IN RE: ONTOS, INC., Debtor.
T. MARK MORLEY; THOMAS J. McCOY, Appellants,
v.
ONTOS, INC.; JOSEPH G. BUTLER, as Chapter 7 Trustee of the Estate of Ontos, Inc.; FIRESTAR SOFTWARE, INC.; KENNETH LORD; AMPHION VENTURES; ROBERT J. BERTOLDI; RICHARD C.E. MORGAN; VENNWORKS, LLC, Appellees.
JOHN FITZGERALD, Trustee.
No. 06-1512.
No. 06-1513.
United States Court of Appeals, First Circuit.
March 1, 2007.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS; [Hon. Richard G. Stearns, U.S. District Judge].

T. Mark Morley, for appellants.

Harold B. Murphy, with whom Christian J. Urbano and Hanify & King, P.C., were on brief, for appellees Firestar Software, Inc. and Kenneth Lord.

Joseph G. Butler, with whom Barron & Stadfeld, P.C., was on brief, for appellee Joseph G. Butler in his capacity as Chapter 7 Trustee of the Estate of Ontos, Inc.

Eric P. Heichel, with whom Eiseman Levine Lehrhaupt & Kakoyiannis, P.C., was on brief, for appellees Firestar Software, Inc., Kenneth Lord, Vennworks, LLC, Amphion Ventures, Robert J. Bertoldi, and Richard C.E. Morgan.

Before Torruella and Lynch, Circuit Judges, and Woodcock, Jr.,* District Judge.

TORRUELLA, Circuit Judge.

This is an appeal of a district court order from February 3, 2006, which affirmed two orders entered by the bankruptcy court on June 29, 2005. Appellants, T. Mark Morley, former chief financial officer of Ontos, Inc. ("Ontos "), and Thomas J. McCoy, also a former officer and employee of Ontos (collectively "Appellants"), challenge the bankruptcy court's approval of a stipulation for waiver and release entered with the Appellees by the trustee for the estate of Ontos. After careful consideration, we affirm.

I.

Ontos was incorporated in Delaware in 1987. In the mid-1990s, Ontos developed a software product named "ObjectSpark." As an unprofitable company, Ontos depended on bridge loans from its majority shareholders, Vennworks, LLC ("Vennworks") and Amphion Ventures ("Amphion"), to pay its operating expenses. In 2000, the Ontos board of directors considered selling ObjectSpark in order to raise capital.

Kenneth Lord became the Chief Executive Officer ("CEO") of Ontos in the late spring of 2001. His principal task as CEO was to find a purchaser for ObjectSpark. When by September 2001, no buyer had materialized, Lord caused a company he had formed, Firestar Software, Inc. ("Firestar"), to submit an offer. Ontos and Firestar were

represented by separate counsel in the ensuing negotiations. An agreement to sell ObjectSpark to Firestar was approved by the Ontos board by a 3-0 vote. The Appellants, who were officers of Ontos and members of the board, were present at the discussion but abstained on the vote. Firestar purchased ObjectSpark for $490,000 in cash, a promissory note for an additional $100,000, which it paid in full, and the assumption of approximately $13 million of Ontos's debt, which was owed primarily to Vennworks and Amphion. Ontos used the proceeds of the sale to pay the salaries of the Appellants and other employees, and debts owed to trade creditors.

The Appellants' employment was terminated by Ontos in January 2002. In June 2002, they jointly brought a lawsuit in state court against Ontos and the Appellees[1] seeking payment of lost wages and severance benefits. The Appellants brought the suit in their individual capacities, not as a derivative action on behalf of Ontos. In separate counts, the Appellants alleged breach of contract, breach of the covenant of good faith and fair dealing, violation of the Massachusetts Wage Act, fraud and deceit, fraudulent transfer, breach of fiduciary duty, and alter ego liability. With respect to the latter three claims, which are at the heart of this appeal, the Appellants contend that the Appellees sold ObjectSpark for less than its fair market value and then used the proceeds "as they saw fit." According to the Appellants, Firestar was an alter ego of Ontos with Lord serving as Firestar's CEO, and its staff composed entirely of former Ontos employees using Ontos's equipment to exploit Ontos's intellectual property.

After eighteen months of litigation in Massachusetts state court, in January 2004, Ontos filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. In April 2004, the Appellants filed a proof of claim for their lost wages and employment benefits, together with copies of their state court complaint, representing themselves as creditors of

Ontos. In May 2004, the Appellants sought approval from the bankruptcy court to proceed in state court against the Appellees. The bankruptcy court gave its permission in June 2004.

In March 2005, the trustee filed a motion to approve a stipulation of settlement and release of Appellants' claims. Over Appellants' objection, the bankruptcy court, in June 2005, allowed the trustee's motion. The stipulation provided that, in consideration of $50,000, the trustee:

releases any and all claims that the Debtor or the Debtor's estate may have against [the appellees] arising out of or related to the conveyance by the Debtor of its ObjectSpark division to Firestar and any and all claims . . . against [the appellees] arising out of or related to any claim that [the appellees] used the corporate form of Ontos for fraudulent purposes . . . and that [the appellees] are liable for the obligations of Ontos on any 'alter ego,' 'piercing the corporate veil' or similar theory . . . .

Before the bankruptcy court, the trustee argued that he had the exclusive right to compromise the fraudulent transfer and alter ego claims because they constitute property of the estate within the meaning of § 541(a) of the Bankruptcy Code, or alternatively, because they could have been asserted at his discretion for the benefit of Ontos's creditors pursuant to § 544. Importantly, the trustee did not purport to compromise the "personal" state law claims asserted by the Appellants for violation of the Wage Act, and fraud and deceit. The Appellants responded that the trustee lacked standing under either provision of the Code. Alternatively, they objected to the release of claims that they value in excess of $1 million for $50,000.

The bankruptcy court granted the trustee's motion to approve the settlement and denied the Appellants' cross-

motion for permission to proceed against the Appellees on the aforementioned claims in state court. The bankruptcy judge explained his rulings as follows:

> I do believe that alter ego and related claims are certainly derivative from any liability that is owed to the debtor here; and being derivative, I believe that they are the Trustee's property and not that of the individual defendants — individual plaintiffs against those other people.
>
> Indeed, that's consistent with the whole bankruptcy concept, which is to take all of the goodies and divide it equally between everybody, and nobody gets an individual piece of the action, and so I'm going to deny the motion to allow [the Appellants] to continue their state action against the other defendants.
>
> As to the approval of the stipulation, this has got to be the most amorphous thing on earth. . . . We've got a highly experienced Trustee who has done such due diligence as is reasonable under the circumstances. It's not as if the software was given away. There was money for it. I can't say that the Trustee is wrong in wanting to settle the claims for the amount of money he's been offered, and the usual rule is that absent anything that raises my eyebrows, my hackles, or disturbs my stomach, I will go with the Trustee's business judgement (sic), and none of those negative factors are present here.

In July 2005, the Appellants filed a notice of appeal and elected to have the case heard in the district court. They also sought a stay pending appeal. The bankruptcy court denied the stay request in August 2005. The district court affirmed the bankruptcy court's decision, finding (1) that the trustee had the authority to enter into the stipulation compromising the Appellants' related claims, (2) that "there was no question but that the Bankruptcy Court had jurisdiction to entertain the

Trustee's motion," and (3) that the bankruptcy court did not abuse its discretion by granting the motion to approve the stipulation for the allegedly nominal sum of $ 50,000. The former two issues are now before this court.

II.

We begin by addressing whether the trustee had standing to enter into the stipulation of settlement and release of the Appellants' claims. We review the bankruptcy court's related factual findings for clear error, and its legal conclusions de novo. Watman v. Groman (In re Watman), 458 F.3d 26, 31 (1st Cir. 2006).

The Bankruptcy Code broadly defines the property of the estate to be comprised of all "legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). It is well established that a claim for fraudulent conveyance is included within this type of property. See Nat'l Tax Credit Partners v. Havlik, 20 F.3d 705, 708-09 (7th Cir. 1994) ("[T]he right to recoup a fraudulent conveyance, which outside of bankruptcy may be invoked by a creditor, is the property of the estate that only a trustee or debtor in possession may pursue once a bankruptcy is under way."); Hatchett v. United States, 330 F.3d 875, 886 (6th Cir. 2003) ("[T]he trustee has the exclusive right to bring an action for fraudulent conveyance during the pendency of the bankruptcy proceedings . . . ."); Campana v. Pilavis (In re Pilavis), 233 B.R. 1, 3 (Bankr. D. Mass. 1999) ("Neither Debtor nor the Trustee disputes the fact that fraudulent conveyance action became the property of the estate when Debtor filed for relief."). The Appellants are incorrect to assert that they have a cause of action for fraudulent conveyance that is separate from the trustee's cause of action. Indeed, creditors only have standing to pursue such claims during bankruptcy proceedings when a trustee or debtor in possession unjustifiably fails to pursue the claim. Pilavis, 233

B.R. at 3-4 (citing Glinka v. Abraham and Rose Co., 199 B.R. 484, 493-94 (D. Vt. 1996)). Such circumstances obviously do not exist here.

We also reject the Appellants' suggestion that there can be a breach of fiduciary duty to creditors that is not derivative of a breach to the corporation. See, e.g., Claybrook v. Morris (In re Scott Acquisition Corp.), 344 B.R. 283, 290 (Bankr. D. Del. 2006)("The defendant's final argument is that the Chapter 7 trustee lacks standing to bring a breach of fiduciary duty claim on behalf of the [corporation's] creditors. This argument is without merit."). Under Massachusetts law, any question pertaining to a duty owed by a director of a corporation to the corporation is governed by the law of the state of incorporation. See Slattery v. Bower, 924 F.2d 6, 9 (1st Cir. 1991). Hence, in this case, we will apply the substantive law of Delaware.

Under Delaware law, creditors of an insolvent corporation are owed fiduciary duties when the corporation is insolvent in fact. Geyer v. Ingersoll Publ'ns Co., 621 A.2d 784, 787-88 (Del. Ch. 1992) ("it is the fact of insolvency which causes the duty to creditors arise"). Even assuming that Ontos was in fact insolvent, a fact not established in the record, these fiduciary duties are on all but rare occasions derivative of the duties owed to the corporation itself. See Prod. Res. Group, L.L.C. v. NCT Group, Inc., 863 A.2d 772, 792 (Del. Ch. 2004)("even in the case of an insolvent firm, poor decisions by directors that lead to a loss of corporate assets and are alleged to be [] breaches of equitable fiduciary duties remain harms to the corporate entity itself"). Thus, claims for breach of fiduciary duty against Ontos's directors accrue to the estate, not the Appellants. In re Scott Acquisition Corp., 344 B.R. at 289 ("a director's fiduciary duty to creditors is derivative of the duty owed to the corporation"); Prod. Res. Group, L.L.C., 863 A.2d at 792 ("when a director of an insolvent corporation, through a

breach of fiduciary duty, injures the firm itself, the claim against the director is still one belonging to the corporation").

The alter ego and successor liability claims present a somewhat more difficult question. Under Massachusetts law, a claim may be brought against the "alter ego" of a corporation when "there is active and direct participation by the representatives of one corporation, apparently exercising some form of pervasive control, in the activities of another and there is some fraudulent or injurious consequence of the intercorporate relationship" or when "there is a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting." My Bread Baking Co. v. Cumberland Farms, Inc., 233 N.E.2d 748, 752 (Mass. 1968). In such circumstances, courts may allow a plaintiff to pierce the corporate veil of limited liability in order to "provide a meaningful remedy for injuries and to avoid injustice." Attorney Gen. v. M.C.K., Inc., 736 N.E.2d 373, 380 (Mass. 2000). Likewise, a claim may be brought against a successor corporation where "it either assumes [the obligation] under express agreement or where the facts and circumstances are such as to show an assumption." Aldrich v. ADD Inc., 770 N.E.2d 447, 452 (Mass. 2002) (quoting Araserv, Inc. v. Bay State Harness Horse Racing & Breeding Ass'n, Inc., 437 F. Supp. 1083, 1089 (D. Mass. 1977)).

The primary roadblock to finding the alter ego and successor liability claims to be part of the estate is that a corporation may generally not pierce its own veil. See McCarthy v. Azure, 22 F.3d 351, 363 (1st Cir. 1994) ("As appellant is not even arguably an innocent third party disadvantaged by someone else's blurring of the line between a corporation and the person who controls it, but, rather, is

himself the one who is claimed to have obscured the line, he cannot be permitted to use the alter ego designation to his own behoof."). Nevertheless, this roadblock is easily circumvented on the facts of the case. In McCarthy, all of the claims at issue were direct claims, i.e., claims brought directly by the plaintiff against a defendant. Here, on the other hand, the trustee is only attempting to settle derivative claims — claims brought by a plaintiff on behalf of a corporation. Because the fraudulent transfer and breach of fiduciary duty claims the trustee wishes to settle are derivative in nature, the same claims pursued against an alter ego or successor corporation must be derivative in nature as well.[2] Given that such derivative claims are properly the property of the estate, the bankruptcy court did not err in finding that the trustee had the power to settle them.

Certain of the trustee's standing, we now turn to the question of the bankruptcy court's jurisdiction. A brief review of the Bankruptcy Code indicates that Congress intended the bankruptcy courts to oversee the settlement and release of the debtor's claims while in bankruptcy. Title 28 provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments . . . ." 28 U.S.C. § 157(b)(1). Core proceedings include "matters concerning the administration of the estate," "proceedings to determine, avoid, or recover fraudulent conveyances," and "other proceedings affecting the liquidation of the assets of the estate . . . ." 28 U.S.C. § 157(b)(2)(A), (H), (O). Here, the trustee's motion falls squarely within the definition of core proceedings: the settlement of the disputed claims clearly concerns the administration of the Ontos estate and the liquidation of its assets. As a core proceeding, the bankruptcy court has jurisdiction over the stipulation.

III.

For the foregoing reasons, we affirm the trustee's authority to enter into the stipulation of waiver and release on behalf of the estate, and the bankruptcy court's jurisdiction to review the stipulation.

Affirmed.

Notes:

* Of the District of Maine, sitting by designation.

1. The Appellees are Vennworks, LLC, Amphion Ventures, Firestar Software, Inc., Robert Bertoldi, Richard Morgan, and Kenneth Lord.

2. Because the particular alter ego claims settled by the trustee in this case are property of the estate, we express no view on the contours of alter ego claims generally under Massachusetts law.

First Circuit Court of Appeals Denial of Petition for Rehearing

Nos. 06-1512

United States Court of Appeals for the First Circuit

IN RE: ONTOS, INC.
Debtor

T. MARK MORLEY
Appellant,

v.

ONTOS, INC.; JOSEPH G. BUTLER, as Chapter 7 trustee of the estate of Ontos, Inc.; FIRESTAR SOFTWARE, INC.; KENNETH LORD;AMPHION VENTURES;ROBERT J. BERTOLDI;RICHARD C.E. MORGAN; VENNWORKS, LLC,
Appellees

JOHN FITZGERALD,
Trustee.

Nos. 06-1512

United States Court of Appeals for the First Circuit

IN RE: ONTOS, INC.
Debtor

Thomas J. Mccoy
Appellant,

v.

ONTOS, INC.; JOSEPH G. BUTLER, as Chapter 7 trustee of the estate of Ontos, Inc.; FIRESTAR SOFTWARE, INC.; KENNETH LORD;AMPHION VENTURES;ROBERT J. BERTOLDI;RICHARD C.E. MORGAN; VENNWORKS, LLC,
Appellees

JOHN FITZGERALD,
Trustee.

Before

Torruela and Lynch, Circuit Judges,
and Woodcock, * District Judge.

ORDER OF COURT

Entered: March 19, 2007

Appellants petition for rehearing is denied

By the Court:
Richard Cushing Donovan, Clerk

By MARGARET CARTER (stamp)
Chief Deputy Clerk

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*of the District of Maine, sitting by designation

11 U.S.C. § 105 Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.
(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.
(d) The court, on its own motion or on the request of a party in interest, may—
(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and
(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—
(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or
(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;
(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;
(iii) sets the date by which a party in interest other than a debtor may file a plan;
(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;
(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or
(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title—
(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
(2) operates as an injunction against the commencement or

continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541 (a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228 (a)(1), or 1328 (a)(1) [1] of this title, or that would be so excepted, determined in accordance with the provisions of sections 523 (c) and 523 (d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)

(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)

(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor,

the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2)

(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)

(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall—

(1) inform the debtor—

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of—

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is

based in whole or in part on a consumer debt that is not secured by real property of the debtor.
(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.
(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.
(g)
(1)
(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.
(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.
(2)
(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.
(B) The requirements of this subparagraph are that—
(i) the injunction is to be implemented in connection with a

trust that, pursuant to the plan of reorganization—
(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;
(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;
(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—
(aa) each such debtor;
(bb) the parent corporation of each such debtor; or
(cc) a subsidiary of each such debtor that is also a debtor; and
(IV) is to use its assets or income to pay claims and demands; and
(ii) subject to subsection (h), the court determines that—
(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;
(II) the actual amounts, numbers, and timing of such future demands cannot be determined;
(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;
(IV) as part of the process of seeking confirmation of such plan—
(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)

(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or

(iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);
(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or
(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.
(4)
(A)
(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.
(ii) Notwithstanding the provisions of section 524 (e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—
(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
(III) the third party's provision of insurance to the debtor or a related party; or
(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
(bb) acquiring or selling a financial interest in an entity as part of such a transaction.
(iii) As used in this subparagraph, the term "related party" means—
(I) a past or present affiliate of the debtor;
(II) a predecessor in interest of the debtor; or
(III) any entity that owned a financial interest in—
(aa) the debtor;
(bb) a past or present affiliate of the debtor; or
(cc) a predecessor in interest of the debtor.
(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—
(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and
(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.
(5) In this subsection, the term "demand" means a demand for payment, present or future, that—
(A) was not a claim during the proceedings leading to the

confirmation of a plan of reorganization;
(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and
(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).
(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.
(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.
(h) Application to Existing Injunctions.— For purposes of subsection (g)—
(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—
(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129 (b);
(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and
(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and
(2) for purposes of paragraph (1), if a trust described in

subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

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11 U.S.C. § 542. Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362 (a)(7) of this title,

an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

11 U.S.C. § 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)

(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 (e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548 (d)(3)) that is not covered under section 548 (a)(1)(B), by reason of

section 548 (a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

11 U.S.C. § 548. Fraudulent transfers and obligations

(a)
(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
(B)
(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
(ii)
(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to

pay as such debts matured.
(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which—
(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or
(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.
(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.
(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.
(d)
(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such

transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution—

(A) is made by a natural person; and

(B) consists of—

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means—

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

11 U.S.C. § 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:
(1) The plan complies with the applicable provisions of this title.
(2) The proponent of the plan complies with the applicable provisions of this title.
(3) The plan has been proposed in good faith and not by any means forbidden by law.
(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.
(5)
(A)
(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under

the plan; and
(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and
(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.
(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.
(7) With respect to each impaired class of claims or interests—
(A) each holder of a claim or interest of such class—
(i) has accepted the plan; or
(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or
(B) if section 1111 (b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.
(8) With respect to each class of claims or interests—
(A) such class has accepted the plan; or
(B) such class is not impaired under the plan.
(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—
(A) with respect to a claim of a kind specified in section 507 (a)(1) or 507 (a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such

claim cash equal to the allowed amount of such claim;
(B) with respect to a class of claims of a kind specified in section 507 (a)(3), 507 (a)(4), 507 (a)(5), 507 (a)(6), or 507 (a)(7) of this title, each holder of a claim of such class will receive—
(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and
(C) with respect to a claim of a kind specified in section 507 (a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.
(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.
(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.
(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.
(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such

benefits.
(b)
(1) Notwithstanding section 510 (a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
(A) With respect to a class of secured claims, the plan provides—
(i)
(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
(ii) for the sale, subject to section 363 (k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
(iii) for the realization by such holders of the indubitable equivalent of such claims.
(B) With respect to a class of unsecured claims—
(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the

allowed amount of such claim; or
(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.
(C) With respect to a class of interests—
(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or
(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.
(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127 (b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.
(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
(b)
(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
(2) Core proceedings include, but are not limited to—
(A) matters concerning the administration of the estate;
(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
(C) counterclaims by the estate against persons filing claims against the estate;
(D) orders in respect to obtaining credit;
(E) orders to turn over property of the estate;
(F) proceedings to determine, avoid, or recover preferences;
(G) motions to terminate, annul, or modify the automatic stay;
(H) proceedings to determine, avoid, or recover fraudulent conveyances;
(I) determinations as to the dischargeability of particular debts;
(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;
(L) confirmations of plans;
(M) orders approving the use or lease of property, including the use of cash collateral;
(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and
(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.
(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.
(4) Non-core proceedings under section 157 (b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334 (c)(2).
(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.
(c)
(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not

exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)

(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection [1] (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158 (d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection [1] shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Massachusetts Wage act M.G.L. c. 149 Section 148

Section 148. Payment of wages; commissions; exemption by contract; persons deemed employers; provision for cashing check or draft; violation of statute.

Section 148. Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or to within seven days of the termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week, or in the case of an employee who has worked for a period of less than five days, hereinafter called a casual employee, shall, within seven days after the termination of such period, pay the wages earned by such casual employee during such period, but any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; and any employee discharged from such employment shall be paid in full on the day of his discharge, or in Boston as soon as the laws requiring pay rolls, bills and accounts to be certified shall have been complied with; and the commonwealth, its departments, officers, boards and commissions shall so pay every mechanic, workman and laborer employed by it or them, and every person employed in any other capacity by it or them in any penal or charitable institution, and every county and city shall so pay every employee engaged in its business the wages or salary earned by him, unless such mechanic, workman, laborer or employee requests in writing to be paid in a different manner; and every town shall so pay each employee engaged in its business if so required by him; but an

employee absent from his regular place of labor at a time fixed for payment shall be paid thereafter on demand; provided, however, that the department of telecommunications and energy, after hearing, may authorize a railroad corporation or a parlor or sleeping car corporation to pay the wages of any of its employees less frequently than weekly, if such employees prefer less frequent payments, and if their interests and the interests of the public will not suffer thereby; and provided, further, that employees engaged in a bona fide executive, administrative or professional capacity as determined by the attorney general and employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a work week of substantially the same number of hours from week to week may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly; and provided, further, that employees engaged in agricultural work may be paid their wages monthly; in either case, however, failure by a railroad corporation or a parlor or sleeping car corporation to pay its employees their wages as authorized by the said department, or by an employer of employees engaged in agricultural work to pay monthly the wages of his or her employees, shall be deemed a violation of this section; and provided, further, that an employer may make payment of wages prior to the time that they are required to be paid under the provisions of this section, and such wages together with any wages already earned and due under this section, if any, may be paid weekly, bi-weekly, or semi-monthly to a salaried employee, but in no event shall wages remain unpaid by an employer for more than six days from the termination of the pay period in which such wages were earned by the employee. For the purposes of this section the words salaried employee shall mean any employee whose remuneration is on a weekly, bi-weekly, semi-monthly, monthly or annual basis, even though deductions or increases may be made in a

particular pay period. The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement. An employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the ay period.

Every railroad corporation shall furnish each employee with a statement accompanying each payment of wages listing current accrued total earnings and taxes and shall also furnish said employee with each such payment a listing of his daily wages and the method used to compute such wages.

This section shall apply, so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee, and commissions so determined and due such employees shall be subject to the provisions of section one hundred and fifty.

This section shall not apply to an employee of a hospital which is supported in part by contributions from the commonwealth or from any city or town, nor to an employee of an incorporated hospital which provides treatment to patients free of charge, or which is conducted as a public charity, unless such employee requests such hospital to pay him weekly. This section shall not apply to an employee of a co-operative association if he is a shareholder therein, unless he requests such association to pay him weekly, nor to casual employees as hereinbefore defined employed by the commonwealth or by any county, city or town.

No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty. The

president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. Every public officer whose duty it is to pay money, approve, audit or verify pay rolls, or perform any other official act relative to payment of any public employees, shall be deemed to be an employer of such employees, and shall be responsible under this section for any failure to perform his official duty relative to the payment of their wages or salaries, unless he is prevented from performing the same through no fault on his part.

Any employer paying wages to an employee by check or draft shall provide for such employee such facilities for the cashing of such check or draft at a bank or elsewhere, without charge by deduction from the face amount thereof or otherwise, as shall be deemed by the attorney general to be reasonable. The state treasurer may in his discretion in writing exempt himself and any other public officer from the provisions of this paragraph.

An employer paying his employees on a weekly basis on July first, nineteen hundred and ninety-two shall, prior to paying said employees on a bi-weekly basis, provide each employee with written notice of such change at least ninety days in advance of the first such bi-weekly paycheck.

[Eighth paragraph as amended by 1998, 236, Sec. 10 effective November 5, 1998 applicable as provided by 1998, 236, Sec. 21. for text effective until November 5, 1998, see 1996 Edition.]

Whoever violates this section shall be punished or shall be subject to a civil citation or order as provided in section 27C.